



No. 65

May 11, 2004

S. 1248 – Individuals with Disabilities Education Improvement Act of 2003

Calendar No. 362

Reported by the Committee on Health, Education, Labor and Pensions on November 3, 2003, with an amendment in the nature of a substitute, by a vote of 21-0. S. Rept. 108-185.

NOTEWORTHY

- The Senate is expected to take up S. 1248 this week (as early as Wednesday morning) under a unanimous consent agreement reached November 21, 2003.
- Under the unanimous consent agreement, up to nine relevant first degree amendments are in order to the committee-reported substitute amendment. Relevant second degree amendments are in order. The u.c. does not provide time limitations.
- Specifically, the first degree amendments in order are: a managers' amendment; amendments related to IDEA funding (one by Senator Gregg and one by Senator Harkin); an amendment designed to restrain IDEA litigation (Senator Gregg); to reduce the IDEA paperwork burden (Senator Santorum); to create new rights for children with disabilities who are homeless (Senator Murray); to coordinate data on developmental disabilities (Senator Clinton); and two other relevant (unspecified) amendments (one by Senator Gregg, one by Senator Kennedy). [Amendments are discussed further in the Possible Amendments section on pp. 7-9.]
- The controversial issue of funding levels for IDEA was left open by the HELP Committee, with the intent of adding that provision by floor amendment. Chairman Gregg's amendment will increase authorized appropriations for IDEA Part B funding by over \$2 billion each year to reach \$26.1 billion by 2011, therefore achieving "full-funding" status in just seven years. An amendment by Senators Harkin and Hagel will authorize new *mandatory* appropriations to reach full funding by 2011, but will leave the current funding amount as a discretionary authorization – and therefore not guaranteeing full funding.

Highlights

S. 1248, the Individuals with Disabilities Education Improvement Act of 2003, reauthorizes the programs under the Individuals with Disabilities Education Act (IDEA) from fiscal years 2004 through 2009, and also provides improvements through provisions that:

- (1) encourage informal and speedy resolution of problems, prevent misidentification of students, and reduce bureaucratic paperwork for teachers;
- (2) provide local fiscal relief through the use of risk pools and allowing localities to use a percentage of IDEA funds in a flexible manner;
- (3) shift IDEA from a compliance-driven model to a performance-driven model;
- (4) make schools safer by providing greater clarity and flexibility in the law, as well as supporting approaches, including behavioral interventions, that prevent dangerous discipline problems;
- (5) provide increased resources to better train teachers and parents;
- (6) facilitate the transition for students with disabilities from school to post-secondary experiences; and
- (7) strengthen implementation of the law to ensure that every child with a disability receives a free appropriate public education (FAPE).

A House bill to reauthorize IDEA, H.R. 1350, was passed by the House on April 30, 2003 by a vote of 251-171.

Background on the Funding Debate

S. 1248 was reported from the HELP Committee with a unanimous bipartisan vote of 21-0. However, the committee did not fully resolve the controversial issue of funding – and so this issue will be the subject of debate and amendments on the Senate floor. Two competing amendments are to be offered, one by Chairman Gregg and the other by Senators Harkin and Hagel. The Harkin/Hagel amendment would change new funding for the State grant program from a discretionary to a mandatory program. Since current funding levels (just over \$10 billion in FY04) will remain discretionary, the amendment does not actually guarantee full funding by 2011. Additionally, the knowledge that IDEA funding is a mandatory entitlement may invite appropriators to reduce discretionary appropriations for the program in favor of other important education programs that do not have entitlement status. Senator Gregg likely will offer an amendment that would maintain IDEA as a discretionary-spending program, but the amendment would authorize new spending each year to create a “glide path” to full funding by 2011.

This floor debate is a result of an ongoing charge that the federal government has not kept its so-called obligation to help the states fund special education. This stems from the law’s use of a formula that requires the federal government to pay the states no more than 40 percent of the average per pupil expenditure (APPE) multiplied by the number of children with disabilities, as identified by the State. The APPE was designed to measure how much it costs to

educate a child generally, and so includes estimated costs for educating disabled as well as nondisabled children. The formula is based upon the estimation that the costs of educating a disabled child are twice the cost of a nondisabled child.

For FY04, an appropriation of \$20.8 billion would have been required to “fully fund” IDEA, i.e., provide the maximum authorized amount, which is 40 percent of the estimated costs. Instead, the federal government covered about 18 percent of the APPE in FY04.

The billion-dollar increase requested by the President in his budget request was incorporated by the Senate into its FY05 budget resolution, S. Con Res 95. This level will cover roughly 20 percent of APPE and bring total funding to \$11.1 billion or one-half of the funding obligation. This would amount to a 10-percent increase over current funding.

The most dramatic increases in IDEA funding have all occurred under Republican control of Congress and/or the White House. Including this year’s request, IDEA funding since FY2001 will have increased by \$4.7 billion or 75 percent. The Republican Congress has already increased funding for IDEA by 224 percent since 1996. If the President’s budget is enacted, it will have increased by 376 percent. In comparison, during Democrat control of Congress in the 1980s, IDEA spending was one of the few appropriations that didn’t grow. In fact, in many of those years the federal government covered less of the states’ APPE for children with disabilities than it had the year before.

The House-passed bill, H.R. 1350, retains IDEA as a discretionary-spending program, and doubles the funding levels in seven years, providing annual increases of over \$2 billion. This is similar to the funding amendment that Senator Gregg is expected to offer.

Background

The special education law – now known as the Individuals with Disabilities Education Act (IDEA) – was enacted in 1975 to assist states in meeting their Constitutional obligation to provide a free appropriate public education to all children if it sought to provide it to some. States that follow federal rules and offer all children, regardless of disability, a free appropriate public education (FAPE) receive federal financial assistance. Through the reauthorization process, the law has been revised several times, most recently in 1997. In 2002, 6.5 million children with disabilities were served through IDEA.¹

Though the law has opened doors for children with disabilities overall, IDEA’s complicated regulatory system detracts from its success. Specific problems with the system were studied by the President’s Commission on Special Education, a 20-member commission organized in 2001 to recommend IDEA reforms. The Commission based its findings on the reports of more than 100 special education experts, practitioners, parents, and disabled

¹President’s Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and their Families*, 2002.

individuals themselves. After receiving the Commission's report, the President issued a list of principles directed at the reauthorization process. The principles are:

- First, improve accountability by aligning IDEA with the principles of the No Child Left Behind Act. The President seeks to decrease emphasis on compliance with procedure and increase emphasis on results.
- Second, simplify the law's burdensome due-process requirements, which create inordinate amounts of paperwork for teachers, limit the ability of schools to discipline children with disabilities who exhibit violent or inappropriate behavior, and intensify adversity between parents and schools.
- Third, reduce misidentification of students, which has fueled growing IDEA costs. Schools are faced with a growing and changing population of special-education beneficiaries, some of which is based on outdated identification practices. The questions of how children with disabilities are identified, and what schools must provide, should be examined with this legislation.
- Fourth, increase the role of parents in determining the most appropriate setting for their disabled child's education. Oftentimes, this may be a private or charter school.

Bill Provisions

Major changes made in the committee-reported bill include:

Provisions to Encourage Cooperative Resolution Over Costly Litigation

These provisions give schools the opportunity to resolve disputes with parents before resorting to a due process hearing.

- The bill would require due process complaints to be clear and specific before parties can go to a due process hearing. (Section 615)
- It encourages prompt resolution of concerns by establishing a two-year time limit for filing a complaint and a 90-day time limit for filing appeals to a court (current law has no time limits for either). The bill does allow the state to establish alternative time limits. (Section 615)
- It requires hearing officers to make decisions based upon the substantive grounds – not on technical errors that have no effect on the child's education. (Section 615)

Provisions to Improve Discipline and School Safety

These provisions allow schools to automatically remove for 45 days students who cause serious bodily injury to others. It reverses the stay-put provision – which forces schools to keep students in their current situation once a parent files a complaint, regardless of the danger to others – by allowing schools to place a student in an alternative educational environment while the complaint and appeal process are being carried out. (Section 615)

Provisions to Reduce Paperwork

- The bill clarifies that no information is required in an Individualized Education Program (IEP) beyond what federal law requires. (The IEP is the contractual document negotiated annually by teachers, administrators and parents for each disabled child. IEPs contain a great deal of detailed information about the child's current status, goals, and the services which will be provided. Typically, the IEP is between 8 and 16 pages in length and is drafted after hours of negotiating meetings with administrators, teachers, related service providers and parents.) (Section 614)
- It eliminates the requirement that IEPs must include benchmarks and short-term objectives (these generate more paperwork, but have rarely been found helpful in gauging progress – see Section 614).
- It reduces – to once a year – the number of times that procedural-safeguards notices must be sent to parents, unless the parent files a complaint or requests a copy. (Section 614)
- The bill requires the Secretary to: develop model IEP forms; review existing paperwork requirements; provide Congress with proposals to reduce the paperwork requirements; and provide Congress with proposals to reduce the paperwork burden on teachers. (Section 617)
- It eliminates the burdensome and unreasonable 813-point procedural checklist that states currently must follow in order to be deemed in compliance with IDEA. This includes having to send the Department of Education copies of each statute, court order, State Attorney General opinion, and other State documents that verify the source of the State policy relating to a free appropriate public education (FAPE). (Section 612)
- It orders an independent review of Federal, State, and local requirements relating to the education of children with disabilities to determine which requirements are responsible for causing the paperwork burden, and orders GAO to issue a comprehensive report regarding the paperwork requirements to enable Congress to determine what appropriate steps can be made to reduce that burden and enable teachers to spend more time in the classroom with children with disabilities. (Section 609)

Provisions to Improve Parental Involvement

- The bill allows parents and schools to agree that a student reevaluation is unnecessary, especially when the student is finishing high school. (Section 614)
- It allows parents and schools to agree to make changes to an IEP during the year without having to reconvene an entire IEP meeting, saving time for parents and schools. (Section 614)

Teacher Provisions

- The bill clarifies that most special education teachers do not have to be certified in every subject they teach but must be certified in special education. (Section 612)
- It designates that 100 percent of State program improvement grants be used to support preparation and professional development for teachers. (Section 612)

Provisions to Reduce Misidentification of Nondisabled Children

- The bill allows for the development of new approaches to determine whether students have specific learning disabilities by clarifying that schools are not limited to using the IQ-achievement discrepancy model. (Section 614)
- It provides funds for training school personnel in effective teaching strategies and interventions to prevent over-identification and misidentification of children. (Section 619)
- It removes any fiscal incentive for states to over-identify children as disabled in order to increase funding. (Section 611)

Provisions to Provide Early Access to Services and Support

– The bill authorizes local education agencies to use up to 15 percent of IDEA funds for support services to help students not yet identified with disabilities but who require additional academic and behavioral support to succeed in a general education environment. (Section 619)

Improvement of Transition Services

– The bill provides an option to develop a three-year IEP for students aged 18 to 21, to directly focus parents and schools on long-term goals for helping students transition to post-secondary activities. (Section 614)

Simplification of Special Education Funding

– By making future years’ funding levels and amounts available more predictable, the bill simplifies funding for grants to: states and local education agencies; state administration; and other state-level activities. (Section 611)

– It provides risk pool funding to cover communities whose IDEA costs increase suddenly due to unanticipated students or special needs. (Section 611)

Creates National Center for Special Education Research

– The bill creates a new research center, which will sponsor research to expand knowledge of the needs of children with disabilities, to improve services supported by IDEA, and to evaluate the implementation of IDEA. Funding for the center is authorized as such sums as may be required. (Title III)

Establishes Curriculum Commission

The bill establishes the Commission on Universal Design and Accessibility of Curriculum and Instructional Materials, which is to evaluate and make appropriate recommendations on universal design and accessibility of curriculum and instructional materials. It will be made up of publishers of instructional materials, elementary and secondary teachers, and advocates for children with disabilities appointed mainly by Congress and the Registrar of Copyrights. Funding is authorized at \$750,000 for fiscal year 2004 and such sums as may be necessary for fiscal year 2005. (Title IV)

Cost

The Congressional Budget Office (CBO) estimates that the bill as reported would authorize additional appropriations of \$841 million in 2004, for a total authorization of about \$10.2 billion in 2004. CBO estimates that the reported bill would increase federal spending by about \$5.3 billion over the 2004-2009 period over current law, assuming that annual levels are adjusted for inflation. CBO estimates that appropriations of those authorized levels would result in additional outlays of \$4.0 billion over the 2004-2009 period. Enacting S. 1248 would not affect direct spending or revenues.

Also, CBO notes that S. 1248 “contains no intergovernmental or private-sector mandates as defined by the Unfunded Mandates Reform Act (UMRA).”

[Source: CBO, November 14, 2003; available at www.cbo.gov]

Administration Position

The Administration has not yet released a Statement of Administration Policy on S. 1248. However, in a SAP released on April 30, 2003 on the House bill (H.R. 1350), the Administration strongly supported that bill and stated, “The Administration will work with the Senate to strengthen H.R. 1350 so that it: (1) builds on the provisions of the bill promoting accountability for results; (2) enables states and local school districts to set aside sufficient funds to serve children with disabilities who need high-cost services; (3) provides a much tighter focus on the children who may receive pre-referral services paid for with IDEA funds; (4) improves planning for the transition of youth with disabilities to post-secondary education, adult services, or employment; and (5) takes care to address properly important legal, constitutional, and other policy issues.”

Possible Amendments

Under the unanimous consent agreement entered into November 21, 2003, only nine first degree amendments are in order to the committee-reported substitute amendment. Relevant second degree amendments are in order. The first degree amendments in order are:

Gregg Funding Amendment

This amendment sets increasing discretionary authorizations for special education grants to states so that Congress will be on track to meet 100 percent of the full funding (40 percent of excess cost) commitment by 2011.

Harkin-Hagel Funding Amendment

This amendment likely will provide authorizations toward full funding and mandatory account appropriations beginning with about \$2 billion in FY 2005 and additional increases each year with only one-half of the full funding commitment reached in 2011 – a proportion that Congress already is expected to meet under discretionary accounts in FY 2005.

Republican Attorneys’ Fee Amendment

IDEA currently allows only parents who are “prevailing parties” in disputes to collect attorneys’ fees, in the court’s discretion. This amendment would change IDEA to permit school districts to recover their attorneys’ fees in the limited instances of when the parent’s case was frivolous, unreasonable, or without foundation, or was presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The determination of whether to award attorneys’ fees

would be a matter of the *court's discretion*. The attorneys' fee award must be *reasonable*. The American Association of School Administrators supports this amendment.

Republican Paperwork Reduction Amendment

The purpose of this amendment is to give states the opportunity to find ways to reduce paperwork work burdens associated with IDEA requirements, to increase the time and resources available for instruction and other activities aimed at improving results for children with disabilities. It authorizes the Secretary of Education to grant waivers of IDEA statutory or regulatory requirements to up to 20 states to reduce excessive paperwork and non-instructional time burdens that do not help to improve educational results for children with disabilities. The waiver time period would not exceed four years. The Secretary would not be allowed to waive any statutory or regulatory requirements relating to applicable civil rights requirements. Nothing in the demonstration program affects the right of a child with a disability to receive a free appropriate public education. Two years after enactment of the new IDEA law, the Secretary shall include in its annual report to Congress a report on the effectiveness of the waivers granted to states which must include any specific recommendations for broader implementation of such waivers. The National Education Association supports this amendment.

Clinton Amendment on Developmental Disabilities

This amendment proposes to amend the Children's Health Act to include the Department of Education in an existing consortium of federal health agencies tasked to do a study on environmental influences that could cause developmental disorders in children. Based upon language in prior legislation, the inclusion of this language *could force* the Department of Education to obtain private information on school children *without having to obtain prior parental consent* under the Family Educational Rights and Privacy Act (FERPA). The Department of Education would be pressured to collect this private information of school children without prior parental consent based upon an *exception* that the Department is an "authorized representative" under law, meaning that it could skirt the parental consent requirement and still be technically compliant with FERPA. Although the Department of Education operated under this exception during the Clinton Administration to collect personally identifiable information under the Workforce Investment Act, the Department rescinded this policy under the Bush Administration in response to pressure from Congress over privacy concerns.

Murray Amendment on Homeless Children

This amendment would require that when a child with a disability who is homeless, or who is a foster child, or who is from a military family, transfers into a new school district, the new district is *required* to immediately provide services to that child based upon their previous IEP. The amendment also *requires* an immediate transfer of records including the previous IEP, supporting documents, and any other records relating to the special education or related services for the child. The amendment further *requires* that assessments are expedited and coordinated with such students' prior and subsequent schools. (Note: the McKinney-Vento Homeless Assistance Act, IDEA, and most states already provide for these rights.)

IDEA relevant

If he chooses to do so, Senator Gregg or his designee could offer an additional relevant amendment.

IDEA relevant

If he chooses, Senator Kennedy or his designee could offer an additional amendment.

Managers' Amendment

This amendment will be offered jointly by Senators Gregg and Kennedy and consist of technical corrections.